

No. 15454

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In the  
United States Court of Appeals  
For the Ninth Circuit

PACIFIC CAGE AND SCREEN CO.,  
a corporation; PET DEALERS SUP-  
PLY COMPANY, a corporation;  
MERCHANTS PET SUPPLY COM-  
PANY, a corporation; and JOHN  
MIDDELKOOP,

*Appellants,*

vs.

CONTINENTAL CAGE CORPORA-  
TION, a corporation,

*Appellee.*

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Appellants' Opening Brief

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**Appellants' Opening Brief**

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This is an appeal by the defendants below from the interlocutory order of the United States District Court for the Southern District of California, Central Division, granting a preliminary injunction [R. 51, 74] in an action for the infringement of U. S. Letters Patent No. Des. 177,326 [R. 97].

## JURISDICTION

Original jurisdiction is vested in the District Court by 28 U.S.C. 1338(a) and 1400(b), and jurisdiction to review the appealed interlocutory order is vested in this Court by 28 U.S.C. 1292(1). The order was made July 31, 1956 [R. 21] and after timely motion for new trial on August 10, 1956, [R. 60], the order was adhered to on September 13, 1956 [R. 74]. Notice of Appeal was filed October 2, 1956 [R. 83], within the prescribed period for appeal.

## STATEMENT OF CASE

Appellee (who was plaintiff below and is hereinafter referred to as plaintiff), charged appellants (who were defendants below and are hereinafter referred to as defendants), with infringing U. S. Letters Patent No. Des. 177,326, issued April 3, 1956 to Sidney Herman on "Bird Cage" [R. 97].

Plaintiff, concurrently with its complaint [R. 3], filed a Motion for Preliminary Injunction [R. 6], and an Order to Show Cause [R. 9] was issued on the same date.

Defendants opposed the Motion for Preliminary Injunction [R. 18] on the grounds that:

(1) A preliminary injunction should not be granted in a patent infringement suit unless the Court is convinced the defense is sham.

(2) The patent in suit had not been adjudicated and found valid.



(3) The patent in suit was applied for knowingly by other than the inventor and is therefore invalid.

(4) Bird cages showing essentially the design of the patent had been manufactured, sold and used more than one year prior to November 1, 1954, the filing date of the application for the patent in suit, and the patent is also invalid for that reason.

(5) A change in proportions is not patentable.

(6) A change in proportions for utilitarian purposes is not patentable.

(7) That, affirmatively, the trial court could not only deny the preliminary injunction, but could also dismiss the complaint.

Over the objection of defendants, the bond posted by plaintiff for the preliminary injunction was set in the amount of only One Thousand Dollars (\$1,000.00), thereby limiting defendants to a total of One Thousand Dollars (\$1,000.00) recovery for damages sustained as a result of the injunction.

As to the patent in suit, it is for a design for a tall cylindrical wire bird cage of vertical straight wires and horizontal, vertically spaced wire rings. It has a flat open top of straight crossed wires with a narrow band of sheet metal lying flat about the edge of the top and an integral circular flange disposed vertically about the top of the cylindrical side wall. This cage body rests in a sheet metal pan supported by three down-

wardly divergent rod-like legs with balls on their lower ends. One of the principal ornamental characteristics of the cage of the patent is a natural tree branch located within the cage, the main stem and sub-branches of which extend generally upwardly and somewhat outwardly toward the side wall of the cage. This specific shape of tree branch is shown in full lines in the drawing of the patent and is, therefore, a definite design limitation.

The shape and proportions of the cage of the design patent in suit are such that a considerable amount of interior cage space is provided, with a minimum of occupied supporting floor space. This is a purely utilitarian consideration.

Plaintiff's patentee Sidney Herman purchased from one Robert Kleid a bird cage substantially identically with the one designated "photograph of cage of Robert Kleid" [R. 98] prior to his application for patent, and patentee inquired of Kleid concerning the manner of manufacture of the cage and the source of his tree branches. Robert Kleid and the patentee Sidney Herman were employed at the same place of business at the time Kleid sold the cage to Herman and at this time, and prior to Herman's application for design patent, Kleid sold duplicate cages to other persons at the same place of employment. [R. 23, 24].

Others had manufactured, sold and/or used bird cages having straight vertical wire-like elements and vertically spaced horizontal rings to provide vertically elongated cylindrical cages with flat open work tops more than one year prior to the application for the

patent in suit. The same is true of the production and sale of such cages supported in pans, with the pans in turn supported by three rod-like legs.

The Complaint and Motion for Preliminary Injunction were filed June 22, 1956, less than three months after the issue of the patent in suit on April 3, 1956. The patent had not then been adjudicated nor is there any evidence that there has since been an adjudication. At the time of suit there was absolutely no acquiescence in the validity of the patent by the trade.

### **SPECIFICATION OF ERRORS**

Defendants submit that the trial court erred:

1.

In granting a preliminary injunction on a newly issued design patent which had never been adjudicated or acknowledged to be valid by the trade.

2.

In granting a preliminary injunction where defendants presented a serious question of fact strongly showing that the patentee of the design patent in suit was not the inventor of the design and that said patentee had actual knowledge that he was not the inventor at the time he applied for the patent in suit.

3.

In granting a preliminary injunction where there was a serious question of fact presented regarding the validity of the design patent in suit, based upon an-

ticipatory prior art and prior public use and sale not considered by the U. S. Patent Office in granting said patent.

## 4.

In summarily ordering defendants to cease the manufacture and sale of the accused design of bird cage and permitting plaintiff, a company in poor financial condition, to post an entirely inadequate bond.

## 5.

In wording the preliminary injunction too broadly. The errors specified in paragraphs 1 through 5 are raised by paragraphs 1 through 5 of Defendants' Concise Statement of Points on Appeal [R. 92].

## SUMMARY OF ARGUMENT

## 1.

### **A PRELIMINARY INJUNCTION SHOULD NOT HAVE BEEN GRANTED BY THE DISTRICT COURT.**

- (a) The patent had not been adjudicated nor acquiesced in.
- (b) There were strong questions of fact raised by defendants regarding the validity of the patent in suit.
- (c) The findings of the District Court are not in accord with the evidence.

## 2.

**THE PATENT IN SUIT IS INVALID**

- (a) The patentee Herman did not invent the design of the patent in suit.
- (b) The patentee Herman filed his application for the patent in suit knowing that he was not the inventor thereof, yet signed an oath to the effect that he was the inventor.
- (c) Cages embodying the design of the patent in suit were sold more than one year prior to the application for said patent.
- (d) Cages embodying the features of the design of the patent in suit were shown in printed publications more than one year prior to the application for the patent in suit.
- (e) The general proportions of the cage are dictated by purely utilitarian requirements.
- (f) This court may not only refuse the order for preliminary injunction but may also dismiss the complaint.

## 3.

**THE BOND REQUIRED OF PLAINTIFF WAS ENTIRELY INADEQUATE TO COVER THE DAMAGES TO DEFENDANTS AS A RESULT OF THE INJUNCTION.**

## 4.

**THE PRELIMINARY INJUNCTION WAS TOO BROADLY WORDED**



## ARGUMENT

## POINT 1.

**A PRELIMINARY INJUNCTION SHOULD NOT HAVE BEEN GRANTED BY THE DISTRICT COURT.****(a) The patent had not been adjudicated nor acquiesced in.**

The patent in suit [R. 97] was granted April 3, 1956 and this action was filed June 22, 1956 [R. 3]. Not only did plaintiff fail to present any evidence of favorable adjudication of the validity of the patent but there was not sufficient time in which such adjudication could have been secured.

There was also a total lack of evidence tending to show acquiescence in its validity by the industry.

To grant a preliminary injunction in a patent case it is necessary to find that plaintiff's patent has been adjudicated and found valid. *Collins vs. Wallin*, 66 F. Supp. 687.

If the validity of a patent has been neither adjudicated nor acquiesced in by the public a preliminary injunction will not be granted. *National Cash Register Co. vs. Remington Arms Co.*, 283 F. 196, Aff. 286 F. 367, C.C.A. 3.

**(b) There were strong questions of fact raised by defendants regarding the validity of the patent in suit.**

The affidavit of Robert Kleid [R. 23], accompanying Defendants' Opposition To Plaintiff's Motion for Preliminary Injunction [R. 18] shows that during the week of July 4, 1954, affiant Kleid took twelve bird cages he had manufactured to the offices of Kirby Company of Los Angeles and sold all twelve of said cages to Kirby salesmen. Of that group of twelve cages, affiant sold one to the patentee Sidney Herman.

In the Kleid affidavit [R. 24] the affiant clearly describes a bird cage such as that designated "photograph of cage of Robert Kleid" [R. 98]. In the same affidavit affiant Kleid averred that patentee Sidney Herman inquired about the manufacture of the pan and the source of the tree branches which were placed in the cages.

If Sidney Herman had independently and previously conceived a design of bird cage substantially identical to that of the cage of Robert Kleid, it does not seem plausible that Herman would have purchased one of Kleid's cages and inquired of Kleid as to its manufacture and the source of tree branches used as perches.

Affiant Kleid states that some of the first cages which he made in conjunction with one Marvin Lulla were sold to The Coral Reef bird shop at the Farmers' Market about a month prior to the time he sold a cage to Sidney Herman during the week of July 4, 1954. Mr. Kleid also states that when patentee Sidney Her-

man purchased the cage from him, Mr. Herman talked as though he had never seen one like it before and also inquired as to where some of the materials were secured.

Mr. Kleid in his affidavit avers that the first cages made by Sidney Herman, some time after the sales meeting at the Kirby Company the week of July 4, 1954, were copies of the cages which affiant and Marvin Lulla had produced. These facts are not controverted by the patentee Sidney Herman.

Defendants produced evidence in the form of an affidavit of Solveig Kennedy [R. 33] to the effect that a Robert Kleid cage [R. 98] was purchased from him by her about three weeks before the week of July 4, 1954.

Defendants produced publications in the form of catalog illustrations showing bird cages containing the general features of the patented design and photographs of cages which had been manufactured and sold prior to one year before the application for the patent in suit. These publications and photographs will be referred to in connection with the discussion of the validity of the patent.

All of this evidence raised strong questions of fact regarding the validity of the patent and should have precluded the grant of a preliminary injunction. The order for the injunction by the District Court was a reversible abuse of discretion. A preliminary injunction should not be granted in a patent infringement



suit unless the court is convinced that the defense is sham. *Gantner vs. Unit Venetian Blind Supply Corp.*, D.C. S.D. Cal., 87 F. Supp. 338.

A preliminary injunction against infringement is not granted unless the patent is beyond question valid and infringed. *Leavitt vs. McBee Co.*, 124 F. 2d 938.

A preliminary injunction is refused against a design patent where defendant's affidavits and exhibits raise issue as to its validity and plaintiff's proofs fail to show public acquiescence. *Crescendoe Gloves, Inc., vs. Rubin*, 89 F. Supp. 922.

Where questions of fact are seriously disputed the matter will be left for final hearing. *Lare vs. Harper & Bros.*, 86 F. 481, 483, C.C.A. 3; *E. I. Horsman & Etna Doll Co. vs. Cauffman*, 286 F. 372, C.C.A. 2, Cert. Den. 261, U.S. 615; *Decorative Stone Co. vs. Building Trades Council*, 13 F. (2d) 123, C.C.A. 2, Cert. Den. 277, U.S. 594.

**(c) The findings of the District Court are not in accord with the evidence.**

Finding VIII [R. 76] is to the effect that the bird cage in question in a short time attained a surprisingly dominant economic position in the bird cage field by virtue of its novel appearance and unusual attractiveness of design. This finding is unsupported by any evidence. There is nothing in the record to indicate how many cages of any type were sold and there is no comparison between the volume of sales of the cage of the patented design and similar cages with other types

of bird cages. Insofar as the record is concerned, the volume of sales of bird cages similar to that of the patented design may even have been much less than that of any other type cage.

There is no finding as to whether Sidney Herman, the patentee, did or did not conceive the alleged invention of the patent in suit.

There is no finding as to whether the patentee Sidney Herman was or was not the first inventor, or even the inventor, of the design of the patent in suit.

There is no finding with regard to the substantial questions of fact raised by defendants as to the validity of the patent in suit.

There is no finding regarding the substantial questions of fact raised by defendants and showing that Sidney Herman was not the inventor of the patent in suit.

There is no finding regarding evidence produced by plaintiff, or the lack of such evidence which might controvert the substantial issues of fact raised by defendants.

There is no conclusion of law as to the possible presumptive validity of the patent in suit. The only conclusions of law are that the court had jurisdiction of the subject matter and the parties, that the plaintiff was entitled to a preliminary injunction and that the bond set by the court was adequate in the premises.

## POINT 2.

## THE PATENT IN SUIT IS INVALID

- (a) In addition to the questions of fact raised by defendants as referred to in Section 1(b) hereof, plaintiff itself filed the affidavit of Maurice R. Lazarus [R. 48] in support of its motion for preliminary injunction.

Mr. Lazarus is the brother-in-law of the patentee Sidney Herman [R. 49]. He avers that prior to August, 1954, and probably in July, 1954, Sidney Herman showed him a bird cage painted black with a tree disposed in the center and "which was substantially similar, to the best of my recollection, to that bird cage shown in Design Patent No. 177,326."

However, affiant Lazarus states [R. 49] that in August, 1954, he gave Sidney Herman a check to make a more commercially feasible model of his cage and that this cage was identical with the cage shown in the patent in suit.

It is important to note that the patentee Sidney Herman purchased the Robert Kleid cage [R. 98] during the week of July 4, 1954 [R. 23], at least several weeks before he received a check from Maurice Lazarus "to make a more commercially feasible model of his cage" in August, 1954 [R. 49].

Not only is the affiant Maurice Lazarus a relative by marriage of patentee Sidney Herman [R. 49], but he jointly engaged in the manufacture and sale of bird cages from August, 1954 to December, 1954 with said Sidney Herman [R. 50], yet Lazarus, as an affiant

for plaintiff, admits that the specific cage structure of the patent in suit was not designed until August, 1954, which was after Herman purchased the Kleid cage.

Affiant Lazarus avers that he saw a bird cage which was substantially similar, to the best of his recollection, to that of the patent in suit, at the home of Sidney Herman "probably in July, 1954." In the absence of evidence to the contrary, and there is none, and in view of the fact that Sidney Herman purchased a Robert Kleid cage during the week of July 4, 1954, it must be assumed that the cage which was shown to Lazarus by Herman in July, 1954, was the cage of Robert Kleid.

**(b) The patentee Herman filed his application for the patent in suit knowing that he was not the inventor thereof, yet signed an oath to the effect that he was the inventor.**

Title 35, U.S.C. 115, states:

"The applicant shall make oath that he believes himself to be the original and first inventor of the process, machine, manufacture, or composition of matter, or improvement thereof, for which he solicits a patent; and shall state of what country he is a citizen. Such oath may be made before any person within the United States authorized by law to administer oaths, or, when made in a foreign country, before any diplomatic or consular officer of the United States authorized to administer oaths, or before any officer having an official seal and authorized to administer oaths in the foreign country in which the applicant may be, whose

authority shall be proved by certificate of a diplomatic or consular officer of the United States, and such oath shall be valid if it complies with the laws of the state or country where made. When the application is made as provided in this title by a person other than the inventor, the oath may be so varied in form that it can be made by him."

In Sections 1(b) and 2(a) hereof it has been pointed out the manner in which Sidney Herman purchased a wire bird cage having substantially the design characteristics of the Robert Kleid cage including the vertically elongated cylindrical wire cage body with its flat top, the supporting pan and the three downwardly divergent rod-like legs with knobs on their ends. To this design of cage, which embodies the principal characteristics of the patent in suit, Herman added three horizontal vertically spaced rings and the small sheet metal corner band about the top of the cage. Neither the three rings nor the corner band have any new or appreciable design characteristics.

A patent which is applied for by one who is not the inventor is void. *Kennedy vs. Hazelton*, 128 U.S. 667.

**(c) Cages embodying the design of the patent in suit were sold more than one year prior to the application for said patent.**

Harry Lachman [R. 31] gave an affidavit to the effect that he manufactured and sold tall cylindrical wire bird cages of vertically elongated mesh such as shown in Exhibit "C" attached to his affidavit [R. 32, 113]. This cage was sold by Mr. Lachman for several



years prior to July 3, 1956. This is, of course, more than one year prior to patentee's filing date of November 1, 1954, particularly as evidenced by invoices [R. 32] dated April 15, 1953 and May 5, 1953, photostat copies of which are exhibited [R. 113, 114].

**(d) Cages embodying the features of the design of the patent in suit were shown in printed publications more than one year prior to the application for the patent in suit.**

The 1930 catalog of The Andrew B. Hendryx Co. [R. 99] shows a cage [R. 100] which is cylindrical and whose body is made of vertical straight wires and vertically spaced horizontal rings. A similar type of design is shown [R. 100] and this cage has a substantially flat top. The Hendryx cage from the 1930 catalog [R. 102] shows the vertical wires and horizontal rings, a supporting pan and supporting legs therefor. A wire cage with a flat top, a band about the upper portion of the cylindrical body and a supporting pan are also shown by Hendryx [R. 103] and one of a very similar type in the same catalog [R. 104].

Defendant Pacific Cage and Screen Company's predecessor Pacific Coast Wire and Iron Works, in its 1938 catalog [R. 105] shows a cage [R. 106] of vertical straight wires, three vertically spaced horizontal rings, a supporting pan for the wire cage body and three rod-like legs.

While not referring to a published picture, the affidavit of Harry Lachman [R. 31] identifies an imported

Chinese cage [R. 111] which is cylindrical in shape and tall compared to its diameter. It is of straight vertical members and vertically spaced horizontal rings, it has a substantially flat top and presents a very similar appearance to the cage body of the patented design. This cage has been in the possession of Mr. Lachman for 10 to 15 years. Mr. Lachman also identified a cage [R. 112] which is made of straight vertical members and spaced horizontal rings with a flat open work top.

A design patent is not the same as a regular mechanical patent wherein new mechanical functions and structure are involved. To obtain a valid design patent is exceedingly difficult as pointed out by the Second Circuit Court of Appeals in *Charles D. Briddell, Inc. vs. Alglobe Trading Co.*, 103 F. Supp. 530.

The same exceptional talent is required for a design as for a mechanical patent. *Cornick vs. Stry-Lenkoff Co.*, 134 F. Supp. 126.

A design patent must be possessed of novelty. The adaptation of old devices to new purposes, however convenient or useful they may be in their new role, is not invention. *Western Auto Supply Co. vs. American-National Co.*, 114 F. (2d) 711 C.C.A. 6.

A design patent must disclose inventive originality in design and ornamentation. Mere mechanical skill is no more sufficient to constitute inventive art in the case of the design artist than in the case of the engineer. *Capex Co. v. Swartz*, 166 F. (2d) 5, C.C.A. 7; *Cavu Cloths vs. Squires Inc.*, 185 F. (2d) 30, C.C.A. 6.

The fact that a design may be distinguished from those found in the prior art does not import the required novelty and ornamentation. Its overall aesthetic effect must represent a step which has required inventive genius beyond the prior art. *Burgess Vibrocrafters vs. Atkins Industries*, 204 F. (2d) 311, C.C.A. 7.

**(e) The general proportions of the cage are dictated by purely utilitarian requirements.**

As pointed out above cages which are supported by legs from the floor are old and cages which are taller than their diameters have also been designed before. The more exaggerated elongation of the height of the cage is purely utilitarian since it provides more interior cage space for a given amount of utilized floor space.

**(f) This court may not only refuse the order for preliminary injunction but may also dismiss the complaint.**

In *Mast Foos & Co. vs. Stover Manufacturing Co.*, 177 U.S. 485, it was held that the Circuit Court of Appeals could not only reverse an order granting a preliminary injunction but could also direct the court below to dismiss the complaint. This was followed in *Becker vs. Contoure Laboratories, Inc.*, 29 F. (2d) 31, 34, C.C.A. 2, and in *Brill vs. Peckham Motor Truck and Wheel Co.*, 108 F. 267, 271, C.C.A. 2. In the *Brill* case the court stated:



“The case is one in which it is apparent that the complainant cannot ultimately prevail, and, following the practice sanctioned by *Mast, Foos & Co. vs. Stover Mfg. Co.*, 177 U.S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856, one in which the complaint should be dismissed.”

### POINT 3.

#### **THE BOND REQUIRED OF PLAINTIFF WAS ENTIRELY INADEQUATE TO COVER THE DAMAGES TO DEFENDANTS AS A RESULT OF THE INJUNCTION.**

There are four defendants in this action. The District Court arbitrarily set the bond for the preliminary injunction at One Thousand Dollars. The affidavit of Joseph H. Babros, President of defendant Pacific Cage and Screen Co., [R. 72, 73] shows that said defendant had gross sales of its accused “Coronado” cages during 1955 in the neighborhood of One Hundred and Fifty Thousand Dollars and that plaintiff’s financial condition was very poor.

The amount of damage incurred by defendants as a result of the grant of the preliminary injunction undoubtedly is far in excess of the One Thousand Dollar bond but defendants cannot recover for such damages over the amount of the bond. This clearly was an abuse of discretion on the part of the District Court.

**POINT 4.****THE PRELIMINARY INJUNCTION WAS  
TOO BROADLY WORDED**

The injunction [R. 86] sets forth certain features of the design of the patent in suit with regard to which defendants are precluded. However, the definition of an elongated cylindrical body with spaced cylindrical rods (not limited to vertical rods), widely spaced horizontally oriented rings (of any type or kind whatsoever), a body supporting pan which is relatively deep and of sheet metal (the shape and proportions of which are not defined) supported upon three wrought iron legs (presumably of any shape, size or design), and the body at its upper extremity having a sheet metal ring or cap with a depending cylindrical flange and a horizontal flange overlying the top of the body (there being no definition of the extent, shape or design of either flange).

A design patent is limited to what is shown in the drawing. The court abused its discretion in granting an injunction which is so worded that the defendants are prohibited from manufacturing bird cages which would depart widely from the design of the patent in suit.

## CONCLUSION

It is respectfully submitted that the District Court abused its discretion in granting the preliminary injunction in the face of strong evidence that the patent in suit is invalid in view of the prior art, as well as evidence strongly tending to show that the patentee filed his application for patent with full knowledge that he was not the inventor of the patented design.

The District Court abused its discretion in summarily issuing the preliminary injunction and in requiring an entirely inadequate bond.

For the reasons hereinabove stated defendants respectfully submit that the interlocutory order of the District Court be reversed and that the patent be decreed invalid for anticipation and want of patentability over the prior art and further because the patentee knowingly was not the inventor of the design thereof.

Respectfully submitted,

FRED H. MILLER

and

ALLAN D. MOCKABEE

HAZARD & MILLER

By.....

Allen D. Mockabee,

*Attorney for Appellant.*

Dated: .....

